Supreme Court, U.S.
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In The
Supreme Court of the United States

GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. a/k/a CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE and BURT A. BAZZLE, in a representative capacity on behalf of a class and for all others similarly situated, DANIEL B. LACKEY, GEORGE BUGGS, and FLORINE BUGGS, in a representative capacity on behalf of a class and for all others similarly situated,

Respondents.

On Writ Of Certiorari To The South Carolina Supreme Court

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Consumer Advocates ("NACA") is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and students whose primary practice involves the protection and representation of consumers. Its mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members as well as consumers in the ongoing struggle to curb unfair and abusive business practices. From its inception, NACA has focused primarily on issues which concern abusive and fraudulent business practices affecting consumers. Its specific areas of concern include abusive practices by financial institutions in the extension of credit and unlawful practices by mortgage lenders and brokers such as imposing excessive and unreasonable fees and charges on homeowners.

NACA has a particular interest in ensuring that consumers have access to the courts through the powerful procedural tool of the class action. Recognizing the paramount importance of the class device to consumers with small claims, NACA has issued *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, which was published at 176 F.R.D. 375 (1997). NACA files this

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[1] Pursuant to Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the clerk.

amicus curiae brief to focus this Court on the central importance of the class action device to consumers, and to debunk arguments by Petitioner and its *amici* that class actions are somehow incompatible with arbitration.

SUMMARY OF ARGUMENT

Class actions are a critical tool that permit consumers to seek redress for small claims that would otherwise go uncompensated, and also provide deterrence against corporate misconduct that would otherwise go unpunished. One of the primary purposes of the 1966 amendments to Federal Rule of Civil Procedure 23 was to facilitate consumers' access to the courts in the context of small damages claims. In the absence of the class device, consumers could not pursue many such small claims, either in the context of individual litigation or individual arbitration.

The class device complements the policy goals of arbitration by creating efficiencies and reducing unnecessary, repetitive presentation of claims. Although class certification itself requires judicial intervention and resources of the parties, even in the arbitration context this investment in resources ultimately provides tremendous overall savings by eliminating substantial duplication as compared with individual arbitrations. Classwide arbitrations do not create any due process difficulties that are not routinely resolved by courts in the class litigation context.

In the context of arbitration agreements, like the one in this case, that are silent as to class certification, the rules of contract interpretation should allow for classwide

arbitration. No language in the contract unambiguously suggests that the parties freely and knowingly bargained away any rights to pursue class certification, and class certification is wholly compatible with arbitration. For this reason the right to pursue class certification is different from other procedural rights, such as the right to jury trial, which by necessity are waived when one agrees to arbitrate.

The contractual limitation of the scope of arbitration to "this contract" is ambiguous, and should therefore be resolved against Petitioner, who drafted the agreement. Courts should not assume that a consumer has agreed to waive the right to pursue classwide relief in the absence of contractual language to support such a waiver.

ARGUMENT

I. THE CLASS ACTION DEVICE IS AN ESSENTIAL TOOL FOR ENSURING THAT CONSUMERS WITH SMALL CLAIMS HAVE ACCESS TO JUSTICE.

Consumer class actions serve an important function in our judicial system and can be a major force for economic justice. They often provide the only effective means for challenging wrongful business conduct, stopping that conduct, and obtaining recovery of damages caused to the individual consumers in the class. Frequently, many consumers are harmed by the same wrongful practice, yet individual actions are impracticable because the individual recovery would be insufficient to justify the expense of bringing a separate lawsuit. Without class actions, wrongdoing businesses would be able to profit from their misconduct

and retain their ill-gotten gains. Class actions by consumers aggregate their power, enable them to take on economically-powerful institutions, and make wrongful conduct less profitable.

This Court has explicitly recognized the primary role the class device serves in ensuring that consumers may access the courts:

> A significant benefit to claimants who choose to litigate their individual claims in a class-action context is the prospect of reducing their costs of litigation, particularly attorney's fees, by allocating such costs among all members of the class who benefit from any recovery. Typically, the attorney's fees of a named plaintiff proceeding without reliance on Rule 23 could exceed the value of the individual judgment in favor of any one plaintiff. Here the damages claimed by the two named plaintiffs totaled $1,006.00. *Such plaintiffs would be unlikely to obtain legal redress at an acceptable cost, unless counsel were motivated by the fee-spreading incentive and proceeded on a contingent-fee basis.* This, of course, is a central concept of Rule 23.

Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 338 n. 9 (1980) (emphasis added).

Other federal and state courts have echoed the importance of class actions to consumers. *See, e.g., DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995) ("the purposes behind class actions [are to] eliminat[e] the possibility of repetitious litigation and provid[e] small claimants with a means of obtaining redress for claims too small to justify individual litigation.") (quoting *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 249 (3d Cir.), *cert.*

denied, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975)); *In re Texaco, Inc. Shareholder Litig.*, 20 F. Supp.2d 577, 596 (S.D.N.Y. 1998) ("[u]ndoubtedly, class actions can be 'powerful tools for justice' where they compensate victims of discrimination, provide a means for reforming oppressive governmental institutions and deter wrongful business conduct where individuals, acting alone, would not have the means to sue") (internal citations and quotations omitted); *Vasquez v. Superior Court,* 4 Cal.3d 800, 808, 94 Cal.Rptr. 796, 484 P.2d 964 (1971) (class actions play a critical role because "[t]he alternatives of multiple litigation (joinder, intervention, consolidation, the test case) do not sufficiently protect the consumer's rights because these devices presuppose a group of economically powerful parties who are obviously able and willing to take care of their own interests individually through individual suits or individual decisions about joinder or intervention").

The framers of state and federal class procedure clearly recognized the importance of the class action for consumers. Indeed, one of the primary purposes of the 1966 amendments to Rule 23 was to "mak[e] the Rule 23 action an economically effective procedure for adjudicating numerous similar but small claims." CHARLES A. WRIGHT & ARTHUR MILLER, 7A FEDERAL PRACTICE & PROCEDURE §1756 at 14916 (2002); *see also* William Schwarzer, *Structuring Multiclaim Litigation: Should Rule 23 Be Revised?*, 94 MICH. L. REV. 1250, 1251-55 (1996) (facilitating prosecution of small claims was one of the two primary purposes behind adoption of 1966 amendments to Rule 23). Otherwise, those same consumers would lack any reliable means to pursue relief for such small claims. *Roper*, 445 U.S. at 339 ("Where it is not economically

feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device").

Class actions also serve the important public policy goal of deterring corporate misconduct that would otherwise go unchecked. Often, class counsel and class representatives act as private attorneys general vindicating cumulative wrongs and obtaining significant injunctive relief or institutional change, and requiring disgorgement of illegal profits. *See* HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS §§ 5.49 & 5.51 (3d ed. 1992). In the absence of the work of these private attorneys general, and in light of the overwhelmed resources of state and federal attorneys general across the country, corporations would effectively be granted license to steal billions from consumers, so long as they could do it a few dollars at a time.

The availability or imposition of arbitration for small consumer claims does not ameliorate the consumers' need for the class device. Often, the same consumer claims that prove too expensive to *litigate* individually are also too expensive to *arbitrate* individually. *See* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 90 n.353 (2000) ("where a class action is excluded from arbitration, it is likely that many if not most of the claimants will not be able to arbitrate their claims").

None of the above is lost on corporate defendants, who naturally seek to avoid class actions in any context as a means to avoid liability altogether. Unsurprisingly, defense counsel and other corporate arbitration advocates

have urged industry to "defend themselves" against class actions through use of mandatory arbitration. As one defense lawyer has written, "the franchisor with an arbitration clause should be able to require each franchisee in the potential class to pursue individual claims in a separate arbitration. Since many (and perhaps most) of the putative class members may never do that, and because arbitrators typically do not issue runaway awards, strict enforcement of an arbitration clause should enable the franchisor to dramatically reduce its aggregate exposure." Edward Wood Dunham, *The Arbitration Clause as a Class Action Shield*, 16 FRANCHISE L.J. 141, 141 (1997); *see also* Sternlight, *supra*, at 5 n.2 ("[s]everal commentators have urged companies in various industries to adopt mandatory binding arbitration, at least in part to avoid class actions") (citing Dunham article and four others).

Petitioner's *amicus*, the United States Chamber of Commerce, wrongly argues that in the arbitration context there is no need to make classwide remedies available to consumers. *See* Brief of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Petitioner ("Chamber Br.") at 6-9. This is demonstrably untrue. As described above, industry representatives have specifically urged adoption of no-class-action arbitration provisions as a means to "dramatically reduce aggregate exposure." But if class actions were unnecessary to ensure that consumers have adequate access to a remedy, one would *not* expect significant reductions in defendants' aggregate liability when consumers are forced to pursue individual relief. Put another way, if just as many consumers obtained redress individually as would receive relief when they pursued it through a class action, defendants would have no incentive to oppose availability of the class device. This is consistent

with specific findings issued in at least one consumer class action, that "[i]t would not have been economically feasible to pursue the claims in these cases on an individual basis, whether the case was brought in court or in arbitration." *Ting v. AT&T*, 182 F. Supp.2d 902, 918 (N.D. Cal. 2002), *aff'd in relevant part*, 319 F.3d 112 (9th Cir. 2003).

Often, as in *Ting*, development of small-value consumer claims requires extensive legal analysis, review of hundreds of thousands of pages of documents, and a significant outlay of time and money. Individual consumers cannot afford to pay attorneys an hourly fee for such work, and attorneys cannot afford to represent individual consumers on a contingency basis without the economies of scale afforded by representing a large group. Moreover, in cases such as this one – where the claims at issue allege that loan documents provided for subprime loans failed to satisfy state statutory requirements – few if any consumers could understand the nature of their claims or prove the wilfullness of the statutory violations without legal counsel. Thus, even in the arbitration context, if the class device is unavailable, many consumers will have no effective remedy for corporate misconduct.

II. THE CLASS ACTION PROCEDURE COMPLEMENTS AND ENHANCES THE GOALS OF ARBITRATION AND THE FEDERAL ARBITRATION ACT.

Because increasing efficiency and eliminating unnecessary costs and delays are among the central purposes of arbitration, the class action constitutes arbitration's perfect procedural partner. As one court recently explained:

> Rule 23 was intended to promote the efficient resolution of claims in cases involving multiple parties with similar claims, to eliminate repetitious litigation, and to avoid inconsistent judgments. To that end, the Rule elaborates comprehensive procedures to be followed in class actions. These procedures represent a careful balancing of the need for efficiency with the need to ensure adequate protection for the individual members of the class, factors not present in non-class action contexts.

Scardelletti v. DeBarr, 265 F.3d 195, 207 (4th Cir. 2001) (quoting *Gottlieb v. Wiles*, 11 F.3d 1004, 1007 (10th Cir. 1993)). Petitioner's *amici* readily acknowledge that arbitration, like Rule 23, is intended to act as a more efficient alternative to individual litigation. *See* Chamber Br. at 10-11 (extolling low costs and efficiencies of arbitration); Brief of *Amicus Curiae* Directv, Inc. in Support of Petitioner at 11 (noting that arbitration is "supposed to provide" increased efficiency, low costs, and finality). Moreover, this Court has noted that at least one purpose of the Federal Arbitration Act was to eliminate the costliness and delays of litigation. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985).

Despite the protests of Petitioner's *amici* to the contrary, classwide arbitration clearly enhances arbitration's goals of efficiency. *Amici* bemoan the fact that judicial resolution of the class certification issue requires more time and money than would otherwise be spent in an individual arbitration. *See* Directv Br. at 11; Chamber Br. at 11; Brief for American Bankers Association, *et al.*, as *Amici Curiae* in Support of Petitioner at 17-18. This is true – any class action will undoubtedly require more time to resolve than any individual case involving an identical

claim – whether in the litigation or the arbitration context. What Petitioner's *amici* conveniently ignore, of course, are the *overall* efficiencies gained by avoidance of repetitious litigation or repeated arbitration of identical common issues.

A typical arbitration case could involve thousands of consumers who purchased a particular product or service from a defendant, with all of the transactions governed by the same contract of adhesion, which contains identical language for each consumer. Individual arbitrations of such claims would require many more resources, and significant duplication of effort, as compared with a single, classwide arbitration. The efficiencies gained by avoiding repetitive, piecemeal resolution of the claims more than outweighs the delays caused by pursuing class certification.

Classwide arbitration does not create any more due process difficulties than are present in any class action case. Courts can and do supervise the class certification inquiry and notice process in the context of arbitration, while leaving the factfinding and substantive decision-making to the arbitrator. *See, e.g., Dickler v. Shearson Lehman Hutton*, 596 A.2d 860 (Pa. Super. 1991). Nothing about class certification in the arbitration context presents inherent difficulties that courts do not commonly encounter and resolve in class action litigation. *See* Sternlight, *supra*, at 51-52 ("[t]he attorneys uniformly reported that the hybrid process [with courts certifying the class and overseeing notice, and arbitrators resolving the merits] had worked relatively smoothly, and that they had not

found the combination of arbitral and judicial decision-making to be inefficient as compared to class action litigation").[2]

III. WHERE THE ARBITRATION AGREEMENT IS SILENT ON THE ISSUE OF CLASS CERTIFICATION, CLASSWIDE ARBITRATION DOES NOT UPSET THE CONTRACTUAL RIGHTS OF THE PARTIES.

All of Petitioner's arguments rest on a single, flawed premise: that permitting classwide arbitration somehow undermines the benefit of the parties' bargain under circumstances where the contract is silent about class certification. In this case, as in many others involving contracts that fail to mention class certification specifically, nothing about the arbitration clause nor the remainder of the contract indicates that the parties freely and knowingly struck *any* bargain with respect to the consumer's right to pursue class certification. This is true for the simple reason that, as described above, class certification and arbitration are not only compatible procedures, they are complementary.

Many procedural rights, such as the right to trial by jury, are necessarily waived by an arbitration agreement even when they are not specifically mentioned, because

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[2] In the *Lackey* case, unlike *Bazzle*, the arbitrator found that class treatment was appropriate, rather than a court. *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 353-54 (S.C. 2002). If this Court determines that court supervision of the class certification inquiry is necessary in the arbitration context, it could remand the *Lackey* case with directions for the state court to assess whether a class should be certified.

assertion of such rights is not possible in the context of an arbitration. By contrast, however, it is absolutely possible to certify a class for arbitration, and nothing about class certification upsets the policies and purposes of arbitration in general or the Federal Arbitration Act specifically. Indeed, as one California court has noted, permitting classwide arbitration actually *advances* the FAA's goal of enforcing agreements to arbitrate, by making it more likely that the parties will actually proceed to arbitration. *See Blue Cross of California v. Superior Court*, 67 Cal.App.4th 42, 63 (Cal. Ct. App. 1998). As noted above, many consumers will *not* proceed with individual arbitrations because of the cost and difficulty in securing counsel to represent them on small claims, while a class action ensures that a far greater percentage of aggrieved individuals will pursue arbitration.

In essence, Petitioner contends in this case that it expressly agreed to avoid classwide arbitration through inclusion of language in the arbitration clause limiting the scope of arbitration to "this contract." Pet. Br. at 42-44. This argument is weak at best. As the court below noted, there is significant ambiguity as to the meaning of "this contract" when the contract at issue is one of adhesion that was used in hundreds of other transactions involving other consumers. Indeed, the ambiguity of the phrase "this contract" is wonderfully illustrated by one of Petitioner's own *amici*. In the *amicus* brief filed by Directv, Inc., it refers *in the singular* to a form "Sales Agency Agreement" that it uses with dealers *(in the plural)* who distribute the company's satellite television services. According to Directv, "[t]hat Agreement" includes an arbitration clause, etc. Directv Br. at 1; *see also id.* at 4 (referring to "[t]he agreement" between Directv and retailers). Obviously, in

this instance, Directv intended "the Agreement" to mean all of the Sales Agency Agreements reached between the company and several thousand retailers. Clearly, a consumer reading Green Tree's contract at issue here could have interpreted the phrase "this contract" the same way.

Professor Sternlight provides several excellent reasons to support her argument that silent arbitration clauses should not foreclose class actions. *See* Sternlight, *supra*, at 88-90. The general rule of contractual interpretation that a court should construe ambiguities against the drafter, together with the policy concerns that inform that rule, provide powerful support for Sternlight's conclusion: "Companies should not be permitted to rely on a silent arbitration clause, which they drafted, to prevent persons on whom the clause was imposed from proceeding by way of class action." *Id.* at 88. Sternlight also points out that there is no reason to disfavor class actions as a matter of policy, given that they are permitted by the rules of procedure, and their practical benefits outweigh their downsides. *Id.* In sum, Sternlight says, "[c]ourts should not laxly assume plaintiffs intended to waive their right to proceed as a class." *Id.* at 91.

CONCLUSION

This Court should affirm the judgment of the South Carolina Supreme Court.

Respectfully submitted,

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